Supreme Court, U.S.
FILED
01 833 DEC 3 - 2001
OFFICE OF THE CLERK

No. 01-

IN THE

Supreme Court of the United States

WILLIAM T. TSUI and TAMMY LU TSUI,

Petitioners,

v.

MARIKA TOLZ, as Trustee for PHILLIP E. SHERIDAN, and CARDINAL CORPORATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether due process is violated by making a presumption of facts related to personal jurisdiction as a sanction for failure to respond to discovery, where the discovery is not directly related to the jurisdictional claim.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Donna Bumgardner, as Trustee for Phillip E. Sheridan, John Kupka, and Hangtown Leasing Co., a Delaware corporation, were parties before the court of appeals.

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Petitioners, William T. Tsui and Tammy Lu Tsui, respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Eleventh Circuit is not reported, but is reproduced at (App. A.)

The Order and Judgment of the United States District Court for the Southern District of Florida are not reported, but are reproduced at (App. B) and (App. C), respectively.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit ("Court of Appeals") was entered on September 5, 2001. (App. A).

The district court had subject matter jurisdiction based on diversity, 28 U.S.C. § 1332. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V: "No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

Fed. R. Civ. P. Rule 37. Failure to Make Disclosure or Cooperate in Discovery: Sanctions.

* * *

(b) Failure to Comply With Order.

* * *

(2) Sanctions by Court in Which Action is Pending. If a party . . . fails to obey an order to provide or permit discovery, . . . the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

STATEMENT OF THE CASE

On February 11, 1988, Phillip E. Sheridan filed a Complaint for Specific Performance in the United States District Court for the Southern District of Florida, Fort Lauderdale Division, Case No. 88-6088-CIV-GONZALEZ. Named as defendants were John Kupka and Hangtown Leasing Company, a Delaware corporation, neither of which is a party to this appeal. Also named as defendants

were William T. Tsui and Tammy Lu Tsui, the Petitioners before this Court. The Complaint sought to compel the defendants, as purchasers, to meet all of their alleged obligations to plaintiff, as seller, pursuant to a Stock Purchase Agreement relating to all of the stock of an entity known as Galaxy Airlines, Incorporated.

Defendants John Kupka and Hangtown Leasing Corporation filed a Motion to Dismiss for Lack of Personal Jurisdiction or to Transfer Venue, and the Tsuis, represented by separate counsel, did likewise. Hence, all the defendants timely challenged the jurisdiction of the district court over their persons.

On September 30, 1988, the district court entered an Order denying the motion to dismiss or transfer filed by defendants Kupka and Hangtown Leasing Company, while noting that "the plaintiff's pleadings are barely sufficient to survive a motion to dismiss." As to the motions to dismiss or transfer filed by the Tsuis, the district court ruled as follows:

> The motion to dismiss and the motion to transfer filed by the defendants William and Tammy Tsui are hereby RESERVED until the time of trial. Defendants William and Tammy Tsui shall file their answers within 20 days of the date of this order.

In compliance with this order, on November 1, 1988, the Tsuis filed their Answer, Affirmative Defenses and Counterclaim, carefully preserving their defense of lack of personal jurisdiction.

Several years and one bankruptcy stay later, on February 22, 1993, the district court entered an Order on Motion to

Withdraw, granting a request by the attorneys for the Tsuis to withdraw. By then, the Tsuis had been residing in Hong Kong for several years. Four days after allowing counsel to withdraw, the district court entered an Omnibus Order following a status conference that had been held at plaintiffs' request.

The Omnibus Order granted plaintiff's Motion to Compel Production of Documents and directed that the Tsuis deliver all documents responsive to plaintiff's request to the office of plaintiff's counsel within 20 days from the date of the order. No mention was made in the Omnibus Order of the fact that the Tsuis were not then represented by counsel, but the Omnibus Order warned that the failure of the Tsuis to provide the discovery would result in the entry of a default against them simply upon notification to the district court of their failure to respond.

The Tsuis failed to provide the documents requested. Plaintiff twice moved for the entry of default against the Tsuis. The motions merely recited the failure to produce documents and requested the entry of the default as a sanction against the Tsuis. The motions did not mention or argue that "the sanction [was] specifically related to the claim which was at issue in the order to provide discovery." *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982) (*"Bauxites"*).

The district court entered defaults against the Tsuis without elaboration in an Order dated April 8, 1993. On August 31, 1993, the district court entered a Judgement [sic] (App. C) against the Tsuis, among other defendants, granting specific performance "of all of Defendants [sic] obligations set forth in the contract between the parties." *Id.*

In addition, the court awarded monetary damages against all of the defendants, including the Tsuis, jointly and severally, in amounts totaling in excess of $2,000,000, plus unspecified attorney's fees. *Id.*

Thereafter plaintiffs' assignee of the judgment instituted collection proceedings against the Tsuis in H ng Kong. In the Hong Kong proceedings, plaintiffs inaccurately represented to the Hong Kong court that,

> William T. Tsui and Tammy Lu Tsui voluntarily submitted to the jurisdiction of the Florida Court by answering and accepting the Notice and Acknowledgment of Receipt of Summons and Complaint, a copy of which is attached hereto as Exhibit 1.
>
> * * *
>
> They [the Tsuis] were served with process, voluntarily responded and, as stated in my prior affidavit, both personally and through counsel, filed numerous pleadings including additional sworn statements in that action, executed by them.
>
> William T. Tsui and Tammy Lu Tsui had full opportunity to be heard and defend themselves in a meaningful way in that action. In spite of their efforts, Final Judgment was entered against them by [the district court] in accord with the procedures and laws of the United States of America. Said Judgment is valid and binding upon both William T. Tsui and Tammy Lu Tsui.

The plaintiffs failed to mention to the Hong Kong court that there had been a default or a default judgment entered against

the Tsuis. When the Tsuis challenged the representations made to the Hong Kong court and complained that their jurisdictional challenge in the United States had never been adjudicated and that the judgment was therefore void, plaintiffs filed their Motion for Clarification in the district court, in an effort to satisfy the concerns of the Hong Kong court as to what had occurred here. Plaintiffs invoked the provisions of Fed. R. Civ. P. 60, specifically quoting subsection (a) of Rule 60, which permits correction of "clerical mistakes in judgments."

On October 29, 1999, the district court entered an Order granting the requested clarification and stating that "[t]he April 8, 1993 Order of Default and the September 1, 1993 Order of Final Judgment denied as moot all pending motions not otherwise resolved," including the Tsuis' then-pending motion to dismiss for lack of personal jurisdiction. That October 29, 1999 Order was entered without opposition. The October 29, 1999 Order acknowledged that "the [Omnibus] Order did not explicitly dispose of the Motion to Dismiss" for lack of personal jurisdiction but added:

> However, the Court finds that the Motion was clearly denied by virtue of the entry of the Final Judgment of Default.
>
> Although the Order did not explicitly dispose of the Motion to Dismiss, it is clear that by the entry of the Order of Default and the subsequent entry of the Final Judgment, the Motion to Dismiss was moot. . . . [T]he Tsui's Motion to Dismiss was necessarily denied as moot if it was still pending following the Omnibus Order.

At that point, the Tsuis re-entered the case by filing a Motion for Reconsideration of the October 29, 1999 Order on the ground, among others, that the statement quoted immediately above was contrary to established principles of law because a challenge to jurisdiction over the person cannot be denied by mootness.

Several months later, on June 13, 2000, the district court entered the Order appealed from, granting in part and denying in part the Tsuis' Motion for Reconsideration. The June 13, 2000 Order (App. B) retracted the above-quoted passage from the October 29, 1999 Order and the district court acknowledged the prior order to be erroneous:

> The Court recognizes that it incorrectly stated that the Motion to Dismiss was rendered moot by the entry of default.

Id.

However, rather than correcting the error by setting aside the default and the subsequent judgment entered against the Tsuis, the district court asserted a new basis to support maintaining the default:

> In conclusion, it is now clear that the Court did make a determination that as part of the default sanction the Court conclusively presumed personal jurisdiction. Perhaps the Court should have explicitly stated as much in its Order on the Motion for Default. Nonetheless, the Court finds that the lack of an explicit finding of personal jurisdiction does not undermine the judgment.

> However, for the sake of clarity, the Court shall amend the default order to reflect a finding of personal jurisdiction.

Thus, what on October 29, 1999 was described as having been "necessarily denied as moot if it was still pending," by June 13, 2000, became something as to which "the Court did make a determination."

The Tsuis appealed to the United States Court of Appeals, Eleventh Circuit, which affirmed without opinion in an unpublished order. (App. A).

REASONS FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED BECAUSE THE ORDER BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS DEFINING THE LIMITS THAT THE DUE PROCESS CLAUSE PLACES ON THE SCOPE OF FACTUAL PRESUMPTIONS RELATING TO PERSONAL JURISDICTION THAT MAY BE DRAWN FROM A DEFENDANT'S FAILURE TO PROVIDE DISCOVERY.

The district court violated the due process clause, U.S. CONST. amend V, by making a preclusive ruling that the district court had personal jurisdiction over the Tsuis. Because the discovery was not related to personal jurisdiction, any presumption that may draw from the Tsuis' failure to respond is not related to the factual issues underlying the issue of personal jurisdiction. The assertion of personal jurisdiction as a sanction against a defendant who violates a discovery

order may only be made where there is a specific relationship between the factual issues underlying the jurisdictional issue and the information sought in the order to provide discovery. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982).

> Rule 37(b)(2) contains two standards — one general and one specific — that limit a district court's discretion. First, any sanction must be "just"; second, the sanction must be specifically related to the particular "claim" which was at issue in the order to provide discovery.

456 U.S. at 707. Stated differently, a defendant cannot challenge jurisdiction over its person and then refuse to provide the discovery that would shed light on the validity or invalidity of that challenge. If a defendant does so, then the finding of jurisdiction over it is a permissible sanction for the failure to provide discovery relevant to the jurisdictional challenge. 456 U.S. at 709.

In *Bauxites*, the defaulted defendant had argued that until the court established personal jurisdiction over it, any assertion of judicial power violated due process. 456 U.S. at 706. This Court disagreed, holding that the finding of personal jurisdiction as a sanction did not violate due process where the sanction "specifically related to the particular 'claim' which was at issue in the order to provide discovery." 456 U.S. at 707. In that case, as in the instant case, the "claim" was the absence of personal jurisdiction, but in *Bauxites*, unlike in the instant case, the discovery order "specifically related" to the jurisdictional issue.

> CBG [plaintiff below] was seeking through discovery to respond to petitioners' [defendants below] contention that the District Court did not have personal jurisdiction. Having put the issue in question, petitioners did not have the option of blocking the reasonable attempt of CBG to meet its burden of proof . . . . Because of petitioners' failure to comply with the discovery orders, CBG was unable to establish the full extent of the contacts between petitioners and Pennsylvania, the critical issue in proving personal jurisdiction. Petitioners' failure to supply the requested information as to its contacts with Pennsylvania supports "the presumption that the refusal to produce evidence . . . was but an admission of the want of merit in the asserted defense." The sanction took as established the facts — contacts with Pennsylvania — that CGB was seeking to establish through discovery. That a particular legal consequence — personal jurisdiction of the court over the defendants — follows from this, does not in any way affect the appropriateness of the sanction.

456 U.S. at 708, 709 (citation omitted).

The nexus between the sanction and the claim involved in the discovery is crucial to the preservation of due process. In *Hammond Packing Co. v. Arkansas*, 212 U.S. 322 (1909), cited by this Court in *Bauxites*, the Court held that due process was not violated when a court enters a default against a defendant who fails to comply with a discovery order, based on,

> the undoubted right of the lawmaking power to create a presumption of fact as to the bad faith and untruth

> of an answer begotten from the suppression or failure to produce the proof ordered .... [T]he preservation of due process was secured by the presumption that the refusal to produce evidence material to the administration of due process was but an admission of the want of merit in the asserted defense.

Hammond Packing, 212 U.S. at 350-51, as cited and quoted in *Bauxites* in 456 U.S. at 705. This Court in *Bauxites* also noted that the standards established in *Hammond Packing* were embodied in Rule 37(b)(2) "for the due process limits on such rules," citing the Advisory Committee Notes to the Rule in the *Final Report of Advisory Committee on Rules of Civil Procedure 25* (1937). *Bauxites*, 456 U.S. at 705 and note 11.

The key, of course, for the *Hammond Packing* presumption is that "the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery." *Bauxites*, 456 U.S. at 707. Without that specific relationship, there is nothing to which the presumption may be attached, and due process is violated, as was the case in *Hovey v. Elliott*, 167 U.S. 409 (1897). *Hovey* was also discussed by this Court in *Bauxites*, 456 U.S. at 706.

> The situation in *Hammond* [*Packing*] was specifically distinguished from that in *Hovey v. Elliott*, in which the Court held that it did violate due process for a court to take similar action as "punishment" for failure to obey an order to pay

> into the registry of the court a certain sum of money. Due process is violated only if the behavior of the defendant will not support the *Hammond Packing* presumption.

Bauxites, 456 U.S. at 707 (citation omitted). In fact, the proper application of a sanction under Fed. R. Civ. P. 37(b)(2) "is nothing more than the invocation of a legal presumption, or what is the same thing, the finding of a constructive waiver." *Id.* Thus, jurisdiction could be asserted over the person of the Tsuis without violating due process — not for *any* violation of *any* order (*e.g.*, failure to pay money into the registry of the court), but only in a situation involving a specific relationship between the violation and the claim of no personal jurisdiction.

The jurisdictional allegations of the Complaint were that the Tsuis' co-defendant, John Kupka, had executed a contract in Florida, and that the contract was for the purchase of all of the stock of a Florida operation. The Tsuis argued that the Complaint failed to allege facts to support the court's exercise of jurisdiction over their persons under Florida's "long-arm" statute Fla. Stat. § 48.193(1)(g) and applicable federal due-process standards. The Motion noted that the Tsuis did not sign either the contract sued upon or the related promissory note, and they did not agree to guarantee the note. The Motion further noted that, under the terms of the agreement sued upon, the Tsuis were to open a bank account in Sacramento, California, from which their co-defendant, John Kupka, was to draw certain funds. The Tsuis argued that the fact that Kupka used the funds to buy stock in a Florida corporation was insufficient to establish the requisite minimum contacts between the Tsuis and Florida. Among the cases cited in support of the motion was *Compuguide Corp. v. Sachs*, 259

So. 2d 513 (Fla. Dist. Ct. App. 1972), in which a contract negotiated partly in Florida and partly in New Jersey, but ultimately signed in New Jersey, required the defendant to purchase stock in a Florida corporation. 259 So. 2d at 514. On those facts, the state court found insufficient contacts to warrant the exercise of personal jurisdiction over the defendant in Florida pursuant to Florida's long-arm statute. *Id.* at 514-15. This framed the factual issues relating to the jurisdiction claim as being whether the execution (or lack thereof) of the contract by the Tsuis, or the Florida corporation that is the subject of the contract, suffices to establish long arm jurisdiction.

On September 30, 1988, the district court denied the motions to dismiss and transfer filed by defendants Kupka and Hangtown Leasing Company, based upon the district court's finding that it had in personam jurisdiction over those defendants,

> although the plaintiff's pleadings are barely sufficient to survive a motion to dismiss.

As to the Tsuis' motions, the district court decided to postpone ruling until the time of trial.

Later, the district court said of the Tsuis' jurisdictional argument:

> Indeed, as evidenced by the Court's initial reluctance to find personal jurisdiction and willingness to withhold ruling until it had considered evidence on the issue, the Tsuis' [sic] apparently had a decent chance of winning a dismissal on such grounds.

On March 9, 1989, plaintiff Phillip E. Sheridan served his First Request for Production of Documents addressed to the Tsuis. The Request for Production of Documents related to the facts of the commercial transaction involved in the case, not the jurisdictional challenge made by the Tsuis. Because of the critical importance of this point to the disposition of this petition, a review of each request is appropriate along with the plaintiffs' own stated purpose of seeking the documents taken from his Motion to Compel Production of Documents:

> *Request A*: "Any and all documents, as defined above, reflecting communications between you and Kupka."

In his Motion to Compel, Plaintiff explained that what he sought were "the records of the entire relationship between these parties" — not even mentioning jurisdiction.

> *Request B*: "Any and all documents reflecting any communications between you and anyone else regarding your purchase or ownership of GAL" [Galaxy Airlines, Inc.]

Plaintiff explained that what he sought were all documents evidencing "any and all communications . . . regarding [the Tsuis'] intentions or actions concerning this transaction" — not even mentioning jurisdiction.

> *Request C*: "Any and all airline tickets, travel itineraries, or other document reflecting trips taken by you in conjunction with your purchase of GAL."

In his Motion to Compel, plaintiff merely stated: "See response to request A" — which does not even mention jurisdiction. No factual issue was raised that the Tsuis were subject to jurisdiction based on their own physical presence in Florida at any time.

> *Request D*: "Any and all personal diaries, telephone logs, or any other documents memorializing any telephonic communication between you and any other party regarding your negotiation, purchase, or ownership of GAL."

Plaintiff merely stated: "See response to request A" — which does not even mention jurisdiction. No factual issue was raised that the Tsuis were subject to jurisdiction based on any telephone contact with Florida.

> *Request E*: "Any and all documents reflecting any financial profit or loss resulting from your ownership of GAL."

Plaintiff noted the Tsuis' promise to provide records of a loss, but their failure to do so. No mention was made of jurisdiction.

> *Request F*: "Any and all documents reflecting any communication whatsoever from any Government Regulatory Agencies regarding GAL."

Plaintiff noted the Tsuis' acknowledgement that they had been involved with the Department of Transportation and

other governmental agencies regarding their purported ownership and operation of GAL, but had not provided any such documents, claiming they had none in their possession. No mention was made of jurisdiction.

> *Request G*: "Any and all documents reflecting any communication between yourselves and any other person regarding the interpretation or meaning of any of the contracts executed on your behalf regarding the negotiation, purchase, or operation of GAL."

Plaintiff basically reiterated his request and noted that no documents had been provided. No mention was made of jurisdiction.

> *Request H*: "Any and all documents reflecting any communications between yourselves and any of the officers, directors, or employees of GAL before, during, or after your ownership of GAL."

Plaintiff made reference to his "response to request A" and adds that "other documents, such as telephone records concerning calls from the Tsuis to Galaxy offices [in California], are clearly within the scope of this request but have not or [sic] yet been provided". No mention was made of jurisdiction.

> *Request I*: "Any and all documents reflecting your ownership or operation of any other airline companies."

Plaintiff noted that the Tsuis had asserted that they were naïve regarding airline requirements, and he argued that prior or subsequent ownership of airlines would be relevant to that defense. Plaintiff also argued that similar transactions might identify individuals "who may be valuable as rebuttal witnesses regarding [the Tsuis'] credibility in business dealings." No mention was made of jurisdiction.

> *Request J*: "Any and all documents reflecting any agreement of any sort between you and Kupka."

Plaintiff argued that all aspects of any dealings between those parties would reveal "the entire scope and texture of their relationship" and shed light on the alleged agency relationship between them. No mention was made of jurisdiction.

> *Request K*: "Any and all documents reflecting any agreement between you and any person regarding the purchase of GAL."

Plaintiff stated: "Quite simply, any Purchase of GAL by any party that the Kupkas [sic] have documents relating to should be produced." No mention was made of jurisdiction.

> *Request L*: "All documents referred to or reflected in your answers to Plaintiff's First Set of Interrogatories."

Plaintiff noted that the Tsuis had not responded or objected to this request. No mention was made of jurisdiction.

Plaintiff's Motion to Compel Production of Documents contained another page and one-half with additional arguments. The word "jurisdiction" cannot be found anywhere in the entire document, nor the words "contacts" or "minimum contacts" or anything relating to the factual issues framed in the pending jurisdictional challenge.

From the beginning of the attempt to obtain compliance with the Request for Production of Documents, absolutely no consideration was given to the matter of the legal requirements for finding a waiver of personal jurisdiction as a sanction for a party's failure to comply with a discovery Order. Consider, for example, the following statement in the Omnibus Order:

> The failure of Defendants William T. Tsui and Tammy Lu Tsui to comply with this Order shall result in the entry of a default against them upon notification of this Court of their failure to respond.

This language suggests that the district court believed — erroneously — that the failure to produce documents, without more, would suffice to find a waiver of personal jurisdiction as a sanction. At no time were the *Bauxites* case or its requirements mentioned, and they were obviously not met when the defaults and default Judgment were entered.

As an afterthought, once the Tsuis had brought this deficiency to the attention of the plaintiff and the district court, the plaintiff minted a theory that the requested discovery might tend to show an agency relationship between the Tsuis and Kupka, such that Kupka's actions could submit the Tsuis to jurisdiction in Florida. Unfortunately for the

plaintiff, this agency theory is not plead as part of the claim of personal jurisdiction. Any discovery that may result in uncovering an agency relationship is not directly related to the particular claim of jurisdiction at issue. There is no allegation in the Complaint of an agency relationship, and the documents attached to the pleading suggest a lending relationship, not an agency relationship.

The district court apparently did not credit the plaintiffs' agency argument in its June 13, 2000 Order. (App. B). Moreover, the order does not draw any connection between the discovery sought and the jurisdictional issues pending before the district court, instead simply concluding that they were related. From a review of the June 13, 2000 Order, it is apparent that the district court was more concerned with the fact that it had wanted discovery prior to ruling on the jurisdictional issue, that it had warned the Tsuis that a default would be entered if they failed to respond to the Request for Production of Documents, and that the Tsuis had instead "resign[ed] themselves from these proceedings and depart[ed] for Hong Kong." (App. B, p. 8a). While the district court may have been displeased with the Tsuis' strategy, this does not justify a finding of a waiver of personal jurisdiction. As this Court pointed out in *Bauxites*, a "defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." 456 U.S. at 706. The only gloss placed on that observation by the ruling in *Bauxites* is that a defendant who places personal jurisdiction at issue must respond to discovery related to personal jurisdiction. Otherwise, such a defendant remains free to ignore the judicial proceedings. That is what the Tsuis did in this case.

The mere fact that general discovery on the underlying transaction could possibly lead to some unplead basis for personal jurisdiction is not enough to meet the due process test for implying a waiver of personal jurisdiction. Rather, the discovery must be "specifically related" to the "particular claim." 456 U.S. at 707. Discovery which is tangentially related to a potential claim does not suffice.

CONCLUSION

The order of the district court lowers the standard for implying a waiver of personal jurisdiction below the level set by this Court as required to provide due process. Under the district court's standard, any whimsical connection to any conceivable basis for asserting personal jurisdiction would be enough to support a waiver of jurisdiction. This Court should grant the writ to reconfirm the due process standard which must be met before a district court can find personal jurisdiction by default.

It is respectfully submitted that this Court should grant this writ.

Respectfully submitted,

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APPENDIX

APPENDIX A — PER CURIAM ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED SEPTEMBER 5, 2001

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-13691
D. C. Docket No. 88-06088-CV-JAG

PHILLIP E. SHERIDAN,

Plaintiff-Appellee,

versus

JOHN KUPKA,
HANGTOWN LEASING COMPANY,

Defendants,

WILLIAM T. TSUI,
TAMMY LU TSUI,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

(September 5, 2001)

Appendix A

Before TJOFLAT, CARNES, and REAVLEY*, Circuit Judges.

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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* Honorable Thomas M. Reavley, U. S. Circuit Judge for the Fifth Circuit, sitting by designation.

1. 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED JUNE 13, 2000

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-6088-CIV-GONZALEZ

MARIKA TOLZ, as Trustee for PHILLIP E. SHERIDAN, and CARDINAL CORPORATION,

Plaintiffs,

v.

JOHN KUPKA, HANGTOWN LEASING COMPANY, a Delaware Corporation, WILLIAM T. TSUI, and TAMMY LU TSUI,

Defendants.

ORDER

THIS CAUSE has come before the Court on Defendants Tsuis' Motion for Reconsideration, filed November 24, 1999.

Defendants move the Court for a reconsideration of its Order of October 29, 1999, which granted Plaintiff's Motion for Clarification. In the October Order, the Court found that by entry of a default judgment against the Tsuis, the Court previously denied the Tsuis' Motion to Dismiss and found personal jurisdiction. The Court also held that even had the previous Omnibus Order not disposed of the Motion to

Appendix B

Dismiss for lack of personal jurisdiction, such Motion was rendered moot by entry of the Order of Default.

The Tsuis challenge this ruling and argue that the Court cannot acquire jurisdiction by default and that the judgment is void since the Court did not decide the issue of personal jurisdiction.[1] The Court recognizes that it incorrectly stated that the Motion to Dismiss was rendered moot by the entry of default. However, the Court finds that in circumstances such as those presented by this case, the Court can obtain jurisdiction by default, that the Court did have personal jurisdiction, and that the Motion to Dismiss was indeed denied as part of the default order. Thus, the October 29, 1999, Order should properly have stated that the Motion to Dismiss was denied by the default order, not that it was rendered moot thereby.

The Tsuis argue that a court cannot acquire personal jurisdiction by default. In support of this argument, the Tsuis rely heavily on the case of *Familia de Boom v. Arosa Mercantil, S.A.*, 629 F.2d 1134 (1980).[2] In *Familia de Boom*, the Fifth Circuit held that a court may not impose a Rule 37(b)(2) sanction against a party that failed to comply with a court order unless that court has personal jurisdiction over the party. *Id.* at 1139. The *Familia de Boom* also court held

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1. The Tsuis also raise other arguments which the Court finds it unnecessary to address.

2. In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1982) (*en banc*), the Eleventh Circuit adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981. *Id.* at 1209.

that facts supporting personal jurisdiction must be found in the record. *Id.* at 1138-39.

In *Familia de Boom*, the Fifth Circuit held that the default sanction imposed by the district court for failure to comply with discovery was invalid absent a prior finding of personal jurisdiction. In so holding, the court disagreed with contrary decisions by the Eighth and Fourth Circuits. *Id.* at 1139 (citing *English v. 21st Phoenix Corp.*, 590 F.2d 723 (8th Cir. 1979); *Lekkas v. Liberian M/V Caledonia*, 443 F.2d 10 (4th Cir. 1971)).

This Court finds that the Tsuis' reliance on *Familia de Boom* is misplaced. In *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982), the Supreme Court expressly overruled this holding of *Familia de Boom*.[3] *Id.* at 700, 705. There, the Supreme Court held that the actions of a defendant including failure to comply with discovery requests "may amount to a legal submission to the jurisdiction of the court, whether voluntary or not." *Id.* at 704-05. The Court stated:

> The expression of legal rights is often subject to certain procedural rules: The failure to follow those rules may well result in a curtailment of the rights. Thus, the failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of the objection. A sanction under Rule 37(b)(2)(A) consisting of a finding of

3. The Supreme Court cited *Lekkas* and *English* as being in agreement with the Third Circuit decision affirmed in *Bauxites*. *Bauxites*, 456 U.S. at 700 n.8.

> personal jurisdiction has precisely the same effect. As a general proposition, the Rule 37 sanction applied to a finding of personal jurisdiction creates no more of a due process problem than the Rule 12 waiver.

Id. at 705.

This Court warned the Tsuis of an entry of default for failure to comply with discovery. Prior to that the Court issued an order reserving ruling on the Tsuis' Motion to Dismiss until the time of trial. Obviously, the Court found it necessary to consider further evidence on that issue — such evidence that presumably would be provided in discovery. Thus, the Court's warning as to a default judgment contained an implicit warning of a finding of personal jurisdiction for failure to provide discovery. The Tsuis' willful refusal to comply with valid orders of this Court and abandonment of defense of this suit justified the sanction of a default judgment. *See Shawmut Boston Int'l Banking Corp. v. Duque-Pena*, 767 F.2d 1504, 1507 (11th Cir. 1985).

The ruling in *Duque-Pena* is especially applicable here. There, the defendant filed a motion to dismiss for lack of personal jurisdiction. The district court reserved ruling until after the completion of discovery. The defendant's counsel later withdrew from the case. Over the next year, the defendant continually refused to comply with discovery requirements and with court orders thereon. During this time, the court did not rule on his motion to dismiss. Finally, over a year after the filing of the motion to dismiss, the district court granted the plaintiff's motion for Rule 37 sanctions

and held the defendant in contempt, conclusively presumed personal jurisdiction, and granted a default judgment, plus costs and attorneys fees. The district court had not explicitly warned the defendant that a failure to participate in discovery would result in a denial of his motion or in a finding of personal jurisdiction. The Eleventh Circuit affirmed the decision holding that the defendant's "bad faith efforts to delay a valid collection suit justified the sanctions of a default judgment, fees and costs." 767 F.2d at 1507. The court also affirmed the finding of personal jurisdiction. *Id.* at 1506.

Here, the facts are very similar. As the Tsuis themselves state in their Motion for Reconsideration, "The entering of the default against the Tsuis was clearly a sanction for non-compliance with discovery." (Tsuis' Motion, at 16). Implicit in that sanction was the finding of personal jurisdiction. Obviously, since the Court reserved ruling on this issue of personal jurisdiction, part of the discovery material sought would have addressed this issue.

As in *Duque-Pena*, the Court here sought more information on the issue of personal jurisdiction. When Defendants refused to provide discovery, including discovery on this issue, the Court properly imposed the sanction of default. Such default sanction necessarily included the sanction of a finding of jurisdiction.

The Tsuis are correct that this case is unlike one where the defendants "failed to plead or otherwise defend," *Williams v. Life Savings and Loan*, 802 F.2d 1200, 1203 (10th Cir. 1986), since the Tsuis did in fact plead and otherwise defend themselves. (Tsuis' Motion, at 8). However, in this case their

participation is their demise since once entering this case they then forsook it.

The Tsuis were free to completely ignore these judicial proceedings from the outset, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding. *See Bauxites*, 456 U.S. at 706. But by submitting to this Court's determination of personal jurisdiction, the Tsuis agreed to abide by such determination.[4] *See id.* Yet the Tsuis abandoned the process before it got to the stage where the Court might consider such evidence since "[a]t the time the Motion for Default was filed, the Tsuis had left the United States . . . ." (Tsuis' Motion, at 5). Once the Tsuis submitted to this Court's jurisdiction for the limited purpose of determining personal jurisdiction, they did not have the luxury of deciding on their own that this Court lacked jurisdiction and resigning themselves from these proceedings and departing for Hong Kong.

The Tsuis' failure to provide discovery, including discovery that would address the issue of personal jurisdiction, supports a presumption that the "refusal to produce evidence . . . was but an admission of the want of merit in the asserted defense." *Bauxites*, 456 U.S. at 709 (quoting *Hammond Packing Co. v. Arkansas*, 212 U.S. 322, 351 (1909)) (alteration in original).

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4. Indeed, as evidenced by the Court's initial reluctance to find personal jurisdiction and willingness to withhold ruling until it had considered evidence on the issue, the Tsuis' apparently had a decent chance of winning a dismissal on such grounds.

Appendix B

In conclusion, it is now clear that the Court did make a determination that as part of the default sanction the Court conclusively presumed personal jurisdiction. Perhaps the Court should have explicitly stated as much in its Order on the Motion for Default. Nonetheless, the Court finds that the lack of an explicit finding of personal jurisdiction does not undermine the judgment. However, for the sake of clarity, the Court shall amend the default order to reflect a finding of personal jurisdiction.

Accordingly, having reviewed the Motion and the record, and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED that Defendants Tsuis' Motion for Reconsideration, filed November 24, 1999, is **GRANTED IN PART** and **DENIED IN PART** as follows:

1. Defendants' Motion is **GRANTED** in that this Court's Order of October 29, 1999, is **VACATED**;

2. This Court's Order of April 8, 1993, is hereby **AMENDED** to state: As part of the default sanction under Fed.R.Civ.P. 37(b)(2)(C), the Court conclusively finds personal jurisdiction;

3. Defendant's Motion is **DENIED** in all other respects.

DONE AND ORDERED in Chambers at Fort Lauderdale, Florida, this 13th day of June 2000.

s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED AND FILED AUGUST 31, 1993

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CIVIL ACTION NO: 88-6088-CIV-GONZALEZ

DONNA BUMGARDNER, as trustee for Philip E. Sheridan, and CARDINAL CORPORATION,

Plaintiffs,

vs.

JOHN KUPKA, HANGTOWN LEASING COMPANY, a Delaware Corporation, WILLIAM T. TSUI and TAMMY LU TSUI,

Defendants.

JUDGEMENT

THIS CAUSE has come before this Court as a result of this Court's Order granting default against defendants William T. Tsui and Tammy Lu Tsui. In addition, on May 17, 1989, this Court entered an Order granting Default and entering Final Judgement against defendants John Kupka and Hangtown Leasing Company.

Accordingly, having reviewed the record and being otherwise fully advised, it is hereby:

Appendix C

ORDERED AND ADJUDGED that Judgement is hereby entered on behalf of Donna Bumgardner as Trustee for Philip E Sheridan and Cardinal Corporation against John Kupka, Hangtown Leasing Company, a Delaware Corporation, William T. Tsui and Tammy Lu Tsui, jointly and severally, as follows:

1. Specific performance of all of Defendants obligations set forth in the contract between the parties, as more fully alleged in the Complaint for specific performance filed herein, is hereby ordered;

2. Plaintiff Donna Bumgardner as trustee for Phillip E. Sheridan shall recover from defendants John Kupka, Hangtown Leasing Company, William T. Tsui and Tammy Lu Tsui the principal sum of $400,000.00 plus interest thereon from June 30, 1988, at the statutory rate of interest established by Florida law of 12% per annum with interest through June 15, 1993 in the amount of $238,027.35, for a total amount due to Donna Bumgardner as trustee for the bankruptcy estate of Philip E. Sheridan, as of June 15, 1993, of $638,027.35.

3. Cardinal Corporation, as third party beneficiary of Article I, Section 1.3.2 of the contract ordered specifically enforced herein, shall recover from defendants John Kupka, Hangtown Leasing Company, William T. Tsui and Tammy Lu Tsui, jointly and severally, $900,000.00 in principal as of December 31, 1986, plus interest thereon at the statutory rate of interest established by Florida law of 12% per annum from December 31, 1986, until June 15, 1993, in the amount of $589,117.74, for a total amount due Cardinal Corporation of $1,489,117.74.

4. Defendants John Kupka, Hangtown Leasing Company, William T. Tsui and Tammy Lu Tsui, pursuant to Article I, Section 1.3.3 of the contract ordered specifically enforced herein, are further required to pay to the U.S. Internal Revenue Service the entire amount of the tax lien in favor of the Internal Revenue Service, including any and all interest and penalties thereon, owed by Galaxy Airlines or Phillip E. Sheridan as a result of Sheridan's ownership and operation of Galaxy Airlines.

5. This Court will retain jurisdiction regarding the entry of an award for attorney's fees and other further orders as justice requires to facilitate the complete execution of this Judgment.

FOR ALL OF WHICH LET EXECUTION ISSUE FORTHWITH

DONE AND ORDERED in Fort Lauderdale, Florida this 31st day of August, 1993.

s/ Jose A. Gonzalez, Jr.
JOSE A. GONZALEZ, JR.
United States District Judge